## BRIEF IN SUPPORT OF PETITION.

A statement of the grounds on which the jurisdiction of this Court is invoked, and a statement of the case, are contained respectively at page 4 and at pages 1-4 of the petition, *supra.*

### Opinions Below.

The opinion of the District Court (R. 44-51) is reported at 31 F. Supp. 908. The opinion of the Circuit Court of Appeals, rendered December 9, 1940 (R. 131-140), is reported at 116 F. (2d) 338.

## ARGUMENT.

### I

**The Commissioner of Internal Revenue was without power to retake by summary process the moneys theretofore lawfully refunded to petitioner in the exercise of the discretionary power conferred upon him by Congress.**

1. This Court has never directly passed upon the power of the Commissioner to retake by summary process moneys lawfully refunded to a taxpayer. It has held that an erroneous or illegal refund can be recovered by an action brought for that purpose (*U. S.* v. *Wurts,* 303 U. S. 414, 415, 416). But it has never held that the Commissioner of Internal Revenue has power to retake by summary process moneys lawfully refunded. *Burnet* v. *Porter,* 283 U. S. 230, relied upon in the opinion below (R. 136), does not establish that proposition. The dictum in

that case[1], sustaining the Commissioner's power to retake moneys refunded under an interpretation of the law later found to be erroneous, has apparently been limited by *U. S.* v. *Great Northern Railway Co.*, 287 U. S. 144, 153, to cases where public officers "act illegally", as distinguished from cases where they exercise judgment and discretion.

2. The allowance of petitioner's claim for special assessment was the exercise of a final administrative discretion not subject to court review (*Williamsport Wire Rope Co.* v. *U. S.*, 277 U. S. 551), and is therefore subject to the rule established by numerous decisions of this Court cited at page 5, *supra*, that the determination of an administrative officer in a matter which is by law subject to his final determination cannot be reopened by himself or by anyone else.

3. The decision below departs from that rule, and also disregards the decisions of this Court in *Bonwit Teller & Co.* v. *U. S.*, 283 U. S. 258, 264, 265 (and the cases there relied on of *U. S.* v. *Kaufman*, 96 U. S. 567; *U. S.* v. *Real Estate Savings Bank*, 104 U. S. 728, and *Bank of Greencastle's case*, 15 Ct. Cl. 225), and *Daube* v. *U. S.*, 289 U. S. 367, holding that upon delivery to the taxpayer of a certificate of overassessment, the Commissioner's official action is completed and his jurisdiction is exhausted.

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[1] *Burnet* v. *Porter* turned upon the taxpayer's right as a matter of law to a deduction claimed by him. The Commissioner at first allowed the deduction and later changed his ruling and disallowed it. The Board of Tax Appeals sustained the Commissioner, but the Third Circuit Court of Appeals reversed it, upholding the taxpayer's right to the deduction. Petition to this Court for certiorari was filed by the Commissioner, not by the taxpayer. This Court upheld the Commissioner's view of the law and reversed on the merits. The question of the Commissioner's power to redetermine was not presented by petition for certiorari, by assignment of error or by briefs or argument, and was not before this Court for decision (*Le Tulle* v. *Scofield*, 308 U. S. 415, 421, 422).

4. The decision below is in direct conflict with the decisions of the Sixth Circuit Court of Appeals in *Woodworth* v. *Kales,* 26 F. (2d) 178, where the court, anticipating the distinction made by this Court in *U. S.* v. *Great Northern Railway Co., supra,* held that the Commissioner may recall his action where he has failed to follow the law, but not where he has exercised a discretion conferred upon him by law, and also held, contrary to the ruling below (R. 136), that power to recall his exercise of judgment or discretion was not granted by implication by the "compromise provisions" (Revenue Act of 1921, § 1312; Revenue Act of 1924, § 1006; Revised Statutes, § 3229).

A dictum in that case to the effect that the Commissioner might recall an exercise of discretion for fraud or mistake, though contrary to the rulings of this Court cited *supra,* became the basis of the decision by the same court in *Austin Co.* v. *Commissioner,* 35 F. (2d) 910, certiorari denied 281 U. S. 735.[2] In that case and in *Page* v. *Lafayette Worsted Co.,* 66 F. (2d) 339, certiorari denied 290 U. S. 692, the Commissioner's power to recall his allowance of special assessment was sustained, against strong dissent in each case, on a holding that the existence of new facts justifying such action was to be presumed in the absence of evidence to the contrary; and the same result was reached by the Court of Claims in *Oak Worsted Mills* v. *U. S.,* 36 F. (2d) 529, new trial denied 38 F. (2d) 699, certiorari granted limited to another point 281 U. S. 77, affirmed on that other point 282 U. S. 409, and in *Taft Woolen Co.* v. *U. S.,* 38 F. (2d) 704. But no decision prior to the one here sought to be reviewed has sustained a recall of discretionary action based, as here, on a mere reconsideration, and in the absence of fraud or mistake or other new facts.

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[2] *Austin Co.* v. *Commissioner, supra,* did not overrule *Woodworth* v. *Kales, supra,* but the latter is still regarded as law in the Sixth Circuit. *Boyne City Lumber Co.* v. *Doyle,* 47 F. (2d) 772 (D. C. Mich.); *Routzahn* v. *Brown,* 95 F. (2d) 766, 770 (C. C. A. 6).

## II

**The collection by summary process without disclosure of the grounds or basis therefor and without opportunity for court review constituted a taking of petitioner's property without due process of law.**

1. The decision below departs from the principle established by numerous decisions of this Court, cited at pages 5, 6, *supra,* that a taking of property by administrative action without disclosure of the grounds therefor and opportunity for court review, violates the guaranty of due process of law.

2. The holding below that because a redetermination of an ordinary tax liability is not an unconstitutional deprivation of the taxpayer's property, the same is true of the recall of an exercise of discretion (R. 139), is a *non sequitur.* In the former case due process is afforded by the disclosure to the taxpayer of the grounds of the action taken and the right to court review after payment (*Phillips* v. *Commissioner,* 283 U. S. 589, 596, 597), both of which are wanting in the present case.

3. The argument of the Court below, that the absence of the right to court review of the retaking of moneys refunded does not deprive the taxpayer of his constitutional rights any more than the absence of such right with respect to the original action on the special assessment application (R. 139), disregards the vital distinction established by the decisions of this Court between the situation existing before and after rights are acquired through the exercise of administrative discretion (*Johnson* v. *Towsley,* 13 Wall. 72; *Noble* v. *Union River Logging Co.,* 147 U. S. 165, 176, 177; *Garfield* v. *U. S., ex rel. Goldsby* 211 U. S. 249, 262; *White* v. *Chin Fong,* 253 U. S. 90, 92, 93; *Daube* v. *U. S.,* 289 U. S. 367, 372).

4. The holding below that the moneys refunded to petitioner were subject to be retaken without due process of law because the refund was "a dispensation of the sovereign's grace" (R. 139) is, we submit, unsound. Special assessment was not a bounty or gratuity, but an act of justice: it was "a special method of determining the tax for those cases in which the ordinary method of assessment would result in grave hardship or serious inequality" (*Williamsport Wire Rope Co.* v. *U. S.*, 277 U. S. 551, 558). Even in the case of a bounty or gratuity, when once granted, the proceeds become the grantee's property, of which he cannot be deprived without due process of law (*Hines* v. *U. S. ex rel. Marsh*, 105 F. [2d] 85, 89, 90, and note 6 [App. D. C.]; *U. S. ex rel. Lyons* v. *Hines*, 103 F. [2d] 737, 745, 746 [App. D. C.]; *U. S.* v. *Kearns*, 115 F. [2d] 552, 555 [C. C. A. 10]; cf. *Butte, Anaconda & Pacific Railway Co.* v. *U. S.*, 290 U. S. 127, 142; *U. S.* v. *Carpenter*, 84 F. [2d] 813, 814 [C. C. A. 10]).

5. The Court below misapprehended petitioner's position. Petitioner does not claim, as the Court below supposes (R. 134, 138), "a vested right to the unwarranted as well as to the warranted portion of the refund", but only the elementary right to a day in court upon the Commissioner's claim that the refund, or any part thereof, was unwarranted.

6. The holding of the Court below that a taxpayer applying for discretionary relief against excessive taxes, without right to court review of the exercise of the discretionary power, impliedly agrees that if the discretion is exercised in his favor he will hold any moneys paid to him subject to arbitrary retaking by the Commissioner at his uncontrolled whim at any time before the statute of limitations runs (R. 139, 140), abandoning his constitutional right to a day in court before his property is taken, is a *non sequitur* and runs counter to the principles established by the decisions of this Court cited above. Such

a ruling would open the door to unlimited possibilities of corruption or oppression, and would defeat the very purpose of "due process—the protection of the individual against arbitrary action" (*Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, 302).

7. No decision of this Court sustains power in any public officer to take a person's property without disclosure of the grounds or basis for the taking, and without opportunity to defend against it—"a power possessed by no other officer, administrative body or tribunal under our government" (*Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.,* 227 U. S. 88, 91).

8. As governmental powers are expanded, it becomes of increasing importance to maintain and enforce the safeguards afforded by the due process clause against oppressive or arbitrary action (cf. *Morgan* v. *U. S.,* 304 U. S. 1, 14, 15).

## CONCLUSION

**A writ of certiorari should be granted as prayed in the petition.**

Respectfully submitted,

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